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No. 83-1995

In the Supreme Court of the United States

OCTOBER TERM, 1984

GREENSBORO NEWS COMPANY, ET AL., PETITIONERS

v.

THOMAS A. FLANNERY, JUDGE ASSIGNED TO UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in declining to issue a writ of mandamus requiring the district court to vacate an order excluding the press and public from part of the jury selection procedures in a criminal case that had attracted extensive publicity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 727 F.2d 1320. The supplemental opinion of the court of appeals (Pet. App. A16-A22) is reported at 727 F.2d 1326. The district court's opinions of January 5, 1984 (Pet. App. A36-A44) and January 12, 1984 (Pet. App. A27-A35) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1984. A petition for rehearing was denied on March 7, 1984 (Pet. App. A16-A22). The petition for a writ of certiorari was filed on June 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, several news organizations, challenge a pretrial order providing that a portion of the voir dire be conducted in camera in *United States* v. *Griffin*, Crim. No. 83-53-01-G, a criminal trial held in the United States District Court for the Middle District of North Carolina in early 1984.

1. In April 1983, a federal grand jury indicted nine persons (alleged members of the Ku Klux Klan or the American Nazi Party) for conspiring to violate, and violating, the rights of participants in an anti-Klan parade by attacking them because of their race and political beliefs, in violation of 18 U.S.C. 245 and 371, and conspiring to obstruct the subsequent criminal investigation into the incident, in violation of 18 U.S.C. 371. The indictment charged that as a result of defendants' attack, five persons were killed and seven others injured (Pet. App. A3). The federal indictment was returned after many of the same defendants had been acquitted in a state court trial.

The present controversy has its roots in pretrial orders entered in May and October 1983 (Pet. App. A36). Those orders prohibited counsel and witnesses in the federal proceedings from making extrajudicial public statements about the case (*ibid.*).

In November 1983, 17 potential government witnesses moved to relax the ban on public statements. Following a hearing in December 1983, the district court denied the motion on January 5, 1984 (Pet. App. A36-A44). It noted that the matter had received extensive local and national publicity from the time of the shooting in 1979 through the completion of the state court trial in 1980, and that public interest had been aroused again as a result of the federal indictments (*id.* at A37). The court found (*id.* at A37-A38) that past statements by the witnesses, as well as in-court

statements by their counsel,[1] demonstrated that any public comments by the witnesses would be prejudicial to the defendants. Since the witnesses had expressed an intent to generate national publicity about the case, the court rejected the alternative of a change of venue (*id.* at A40). In a further effort to reduce the effect of pretrial publicity, the court indicated (*id.* at A38-A39) that it planned further steps, including additional peremptory challenges and individual in camera voir dire of potential jurors.[2]

Voir dire began four days later, on Monday, January 9, 1984. Following a group voir dire to determine which of the initial group of prospective jurors should be excused for hardship or because of an acquaintance with the parties, Judge Flannery excused all members of the panel from the courtroom, recalled one of them, and announced that individual voir dire would be closed to the public and press (Pet. 4). Neither the prosecution nor the defendants objected to this procedure (Pet. App. A5).

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[1]Counsel for the potential witnesses had characterized the shooting incident as the "Greensboro Massacre," a "brutal, public mass shooting," a "savage racially and politically motivated attack," a "heinous crime," a "horrifying spectacle," and "murder" (Pet. App. A38).

[2]The potential government witnesses petitioned the court of appeals for a writ of mandamus requiring the district court to vacate the order of January 5. The court of appeals declined to issue the writ because it concluded that the district court's order did not violate the witnesses' First Amendment rights. *In re Russell*, 726 F.2d 1007 (4th Cir. 1984). The court stated that the extensive pretrial publicity, the past statements of the witnesses, and their counsel's expression of their desire to make statements adverse to the interests of the defendants supported the conclusion that "there was a reasonable likelihood that the defendants would be denied a fair trial without proscribing certain of petitioners' extrajudicial statements" (726 F.2d at 1010). On April 9, 1984, the witnesses filed a petition for a writ of certiorari in this Court seeking review of the court of appeals' judgment. *Lacie Russell* v. *Thomas A. Flannery, United States District Judge*, No. 83-6543. The United States filed a brief in opposition to the petition on May 30, 1984.

On the afternoon of January 9, 1984, petitioners filed a motion for a hearing concerning the propriety of closing the individual voir dire proceedings (Pet. App. A4). A hearing was held on this motion on January 11, 1984, and the court issued an order denying relief the next day (*ibid.*).[3] In so doing, the court applied what it found to be "[t]he most stringent test" articulated by any court (Pet. App. A30), citing *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 440-442 (1979) (Blackmun, J.). Under that test, an order closing proceedings in a criminal trial is justified only if a substantial probability exists that (1) conducting a public proceeding will irreparably damage a defendant's right to a fair trial; (2) alternatives to closure will not adequately protect the defendant's right to a fair trial; and (3) closure will effectively protect against the perceived harm (*ibid.*).

The district court observed (Pet. App. A31) that "[t]he magnitude of publicity that this case has generated may be unprecedented in this area. A careful and exhaustive *voir dire* process is crucial to ensure that these defendants will be tried by an impartial jury which will render its verdict on the basis of evidence adduced at trial rather than information from the newspapers or television." The court expressed its belief that, in order to accomplish this task, it was necessary to question individual jurors in camera, outside the presence of other potential jurors and of the press (*id.* at A32). The court noted that potential jurors reading press reports of the questions and responses at voir dire "would * * * be

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[3]By January 12, 1984, the district court had identified 48 prospective jurors who were not disqualified for cause and had excused 37 others for cause. The court had previously decided to identify 70 jurors who would not be excused for cause. Because of the extraordinary nature of the case, a panel of 1,500 prospective jurors had been called. Even after many of these had been released because of hardship, more than 750 persons were available for voir dire questioning (Pet. App. A5 & n.4).

irreparably tainted" (*ibid.*). The court further noted (*id.* at A32-A33):

> The nature of this case adds an additional problem to the publication of potential jurors' names, county of residence, and responses to questions. This case involves various organizations that occasionally evoke strong opinions in people. It may be that some people believe that these organizations are prone to violence. If some potential jurors believed these propositions they might be reluctant to express any strong opinions about these organizations, knowing that their responses would be reported by the media. These potential jurors might fear that honest responses would subject them to retribution. Once again, no amount of questioning could remedy responses motivated by fear.

The district court pointed out that the restriction was limited both in scope and duration, because every aspect of the trial other than the individual voir dire would be open, and because the individual voir dire process itself would be recorded and a transcript made available to the public and press (Pet. App. A33). In addition, the court noted that petitioners "did not suggest any alternative measures for the Court to adopt short of its closure order," and that sequestration of the large number of persons necessary to obtain a panel of 70 jurors would be impossible (*ibid.*).

Finally, the district court concluded that the procedure chosen would "protect against the perceived harms" (Pet. App. A34). The court explained (*ibid.*):

> The elimination of publicity concerning the individual *voir dire* will assure that potential jurors will be insulated from the questions and other jurors' answers for as long as possible. Furthermore, the potential jurors will be more candid in their responses if they do not

have to worry about what the public's opinion of those responses might be.

2. Petitioners filed a petition for a writ of mandamus in the United States Court of Appeals for the Fourth Circuit seeking an order vacating the district court's closure order. On the evening of January 12, 1984, the court of appeals entered a temporary stay that halted the voir dire (Pet. App. A5, A25). On January 16, 1984, the court dissolved the stay and denied the mandamus petition (Pet. App. A23).[4] Individual voir dire proceedings resumed in the district court the next day and concluded on January 19 (Pet. 5); on January 20 peremptory challenges were exercised in open proceedings and the jury was empanelled.

The court of appeals' opinion was filed on January 19, 1984. It expressly adopted the trial judge's analysis (Pet. App. A11-A15), and concluded that, "with an unavoidable minimum of interference with freedom of access to information, the district judge has avoided a very real risk of substantial diminution in the rights of the defendants to a trial by an impartial jury guaranteed by the Sixth Amendment" (*id.* at A6). The court commended the trial judge "for a sensitive and sensible solution to an almost intractable problem" (*id.* at A10). The court of appeals emphasized that petitioners had "insisted on but one solution, putting forth no alternative for consideration" (*id.* at A7 (footnote omitted)), and that, although the district court's order delayed press access to the individual voir dire proceedings, it did not prohibit such access altogether (*id.* at A9 & n.7, A10).

On March 7, 1984, the court of appeals denied a petition for rehearing and issued a supplemental opinion (Pet. App

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[4]On January 17, 1984, petitioners applied to this Court for a stay of the district court order. That application was withdrawn on January 23, 1984, following the completion of all closed proceedings in the criminal trial.

A16-A22) that distinguished this Court's recent decision in *Press-Enterprise Co.* v. *Superior Court*, No. 82-556 (Jan. 18, 1984).[5]

On April 15, 1984, the jury acquitted all defendants in *United States* v. *Griffin* on all charges (Pet. 6).

ARGUMENT

The court of appeals' judgment, declining to require the district court to vacate its order closing a portion of the voir dire proceedings to the press and public, was correct. The court of appeals' decision presents no novel questions. Rather, it involves only the application of settled legal principles to the unique facts of this case. The ruling does not conflict with decisions of this Court or other courts of appeals and does not warrant further review by this Court.[6]

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[5]In its supplemental opinion, the court of appeals explained (Pet. App. A18-A19) that its initial opinion had been completed and mailed to the clerk's office on January 17 and that all counsel were notified on that date. For that reason, the initial opinion had not discussed *Press-Enterprise*.

[6]In denying rehearing, the court of appeals deemed it "unnecessary to determine whether the issue of mootness should be explored," but stated it was "skeptical that we are truly presented with a situation 'capable of repetition, yet evading review.' *See Roe* v. *Wade*, 410 U.S. 113, 125 (1973)" (Pet. App. A20 n.4). The court noted that the "*Greensboro News Co.* case, as it developed, is nearly unique" (*ibid.*). Petitioners contend (Pet. 7 n.3) that "[b]ecause the Fourth Circuit upheld the district court's closure order, it is reasonably foreseeable that other *voir dire* proceedings will be closed by other judges" should similar circumstances be present. See *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 602-603 (1982); *Richmond Newspaper, Inc.* v. *Virginia*, 448 U.S. 555, 563 (1980) (Burger, C.J.); *Gannett Co.* v. *DePasquale*, 443 U.S. at 377-378; *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976). While there may be some basis for this contention, the probability of repetition is speculative at best. These circumstances substantially diminish the significance of the case and, taken with the reasons developed below, suggest certiorari should be denied.

1. This Court has held that the press and public have a qualified First Amendment right to attend criminal trials, *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), and voir dire proceedings, *Press-Enterprise Co.* v. *Superior Court*, No. 82-556 (Jan. 18, 1984). That right is, however, not absolute. In appropriate cases, "the right to an open trial may give way * * * to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller* v. *Georgia*, No. 83-321 (May 21, 1984), slip op. 5-6.

In *Press-Enterprise Co.* v. *Superior Court*, *supra*, the Court said (slip op. 3, 8) that "the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown," and specifically that

> [t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

In addition, the trial court must consider reasonable alternatives to closing the proceeding (*id.* at 9). See also *Waller* v. *Georgia*, slip op. 8. As we show below, the closure ordered in this case fully comports with the standards enunciated in *Press-Enterprise* and *Waller*.

a. *Overriding interest.* In *Press-Enterprise*, this Court expressly acknowledged (slip op. 8) that "the right of an accused to fundamental fairness in the jury selection process is a compelling interest" that may, in appropriate circumstances, take precedence over the right of the public and press to open trial proceedings. The district court's findings

in this case — in which the court of appeals concurred — demonstrate that the circumstances fit comfortably within the standards set forth in *Press-Enterprise*.[7]

In the present case, the district court found that, because of extensive pretrial publicity, a substantial probability existed that open voir dire proceedings would irreparably damage defendants' right to a fair trial. Moreover, the court found that potential jurors would be tainted if they read press reports about the questioning of other veniremen (Pet. App. A32). It also found that potential jurors would be less likely to admit bias in the presence of the public and press, and that closed proceedings would alleviate the fear of potential jurors that truthful answers might subject them to retribution (*id.* at A32-A33).

Petitioners assert (Pet. 16) that the district court's findings concerning the effect of pretrial publicity upon jurors are insufficient because they are based entirely upon "speculation." But this Court itself observed in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 563 (1976), that a district court's "conclusion as to the impact of such publicity on prospective jurors [is] of necessity speculative," involving "factors unknown and unknowable." The trial judge's first-hand knowledge of the situation places him in the best position to gauge the effect of the pretrial publicity upon the defendants' right to a fair trial, and there is nothing in the record to suggest that his findings in this regard are incorrect.[8]

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[7]In cases where, as here, the court of appeals has adopted the district court's findings of fact (Pet. App. A6, A12-A13), this Court has traditionally been reluctant to disturb such findings. *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214 (1948).

[8]Analogous findings were made in *United States* v. *Hearst*, 412 F. Supp. 873, 876 (N.D. Cal. 1976). In closing the individual voir dire proceeding to the press and public, the district court explained that:

b. *Narrowly tailored relief.* The district court's closure order in this case was no broader than necessary to protect the defendants' right to a fair trial. The order closed only a small part of the proceedings, the individual voir dire. The remainder of the jury selection process, as well as the entire trial, were open to the press and public.[9] In addition, the order required that the transcripts of the closed proceedings be made publicly available. Unlike a total ban on access, the order under review affords the press the opportunity to inform the public of the details of the closed proceedings. Cf. *Gannett Co.* v. *DePasquale*, 443 U.S. at 393. Thus, the court "narrowly tailored" its order to preserve the defendants' right to a trial by an impartial jury. *Press-Enterprise*, slip op. 8.[10]

c. *Alternatives to closure.* The district court fully discharged its obligation to consider alternatives to closure. It rejected a change of venue or sequestration of the panel, and

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> the Court's purpose in isolating each juror from his or her fellow jurors in the individual questioning process would be ill-served were the remaining jurors to be exposed to news accounts of the proceedings from which they had been barred. Not only would the risk be increased that prospective jurors harboring no preconceived notions as to guilt or innocence of the defendant be implanted with the seed of prejudice by the statements of those questioned before them, but the difficult task of speaking one's mind concerning the highly sensitive and potentially embarrassing topic of personal bias would be made all the more difficult by the presence of a large audience of news reporters busily taking down every spoken word.

[9]In contrast, the closure order in *Press-Enterprise* barred the public from all but three days of voir dire proceedings that consumed six weeks (slip op. 1).

[10]Petitioners state (Pet. 7) that the closed proceedings had not been fully transcribed at the time they filed their petition for a writ of certiorari. As the court of appeals correctly recognized in its supplemental opinion (Pet. App. A21-A22), however, this unanticipated delay in the completion of transcripts does not affect the validity of the district court's closure order.

refused to impose a prior restraint on what the press would be allowed to report (Pet. App. A34, A40).

Petitioners do not contend that the district court erred in rejecting these alternatives. Rather, they assert that the court erred in failing to adopt three other options (Pet. 18-19) that were never presented for its consideration (Pet. App. A33). Having failed to offer these proposals to the lower courts, however, petitioners have no cause to complain to this Court. In any event, as the court of appeals noted (*ibid.*), in the circumstances of this case most measures short of the limited closure order entered by the district court would have been "impractical, if not impossible."

d. *Specificity of findings.* Petitioners contend (Pet. 22) that the district court failed to make specific factual findings capable of meaningful appellate review. This claim is without merit. The district court clearly understood its obligation to articulate findings to support closure (Pet. App. A30), and set forth those findings in sufficient detail (*id.* at A30-A34). The court of appeals expressed no concern over the specificity or precision of the district court's findings (see Pet. App. A11).

This Court's decisions require only that the trial judge articulate "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise*, slip op. 8. That standard was clearly satisfied.

2. Contrary to petitioners' contention (Pet. 7), the court of appeals' decision does not conflict with this Court's decisions. In *Press-Enterprise Co.* v. *Superior Court*, *supra*, the trial judge had made no findings to support his conclusion that the defendant's Sixth Amendment right to a fair trial and the privacy interests of jurors were threatened by an open proceeding (slip op. 9). The trial judge also had

failed to consider any alternatives to closure (*ibid.*) and refused to release the transcript of the closed proceeding even after the defendant had been convicted and sentenced (*id.* at 2). In addition, the closed voir dire proceedings in that case lasted six weeks, a period which the Court characterized as "incredible" (*id.* at 11). Here, in contrast, the district court carefully considered alternatives and made specific findings that fully justify its order; moreover, the closed proceedings comprised only portions of seven trial days, and the transcript was not barred to the press.

Globe Newspaper Co. v. *Superior Court, supra,* is also distinguishable. That case involved a state statute that required trial judges to exclude the press and public from the courtroom during the testimony of an underage victim of a sexual offense. The Court held that the statute violated the First Amendment right of the press and public of access to criminal trials on the ground that "a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional" (457 U.S. at 611 n.27). The instant case, of course, involves no mandatory closure rule and the trial court's findings satisfied the standard for particularity.

Richmond Newspapers, Inc. v. *Virginia, supra,* also presents completely different circumstances. In that case the trial judge closed an entire murder trial. In holding that the closure violated the First Amendment right of the press and public to attend criminal trials, this Court observed that "the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; [and] there was no

recognition of any right under the Constitution for the public or press to attend the trial" (448 U.S. at 580-581).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11]There is no merit to petitioners' claim (Pet. 7 n.4, 21 n.15) that the decision below conflicts with those of other courts of appeals. The cases upon which petitioners rely, *United States ex rel. The Pulitzer Publishing Co.*, 635 F.2d 676 (8th Cir. 1980), *United States* v. *Criden*, 675 F.2d 550 (3d Cir. 1982), and *United States* v. *Brooklier*, 685 F.2d 1162 (9th Cir. 1982), create no standards for articulating reasons for closure that were not satisfied here. The decision below is, at all events, in full accord with the decisions of other courts of appeals upholding closure orders entered to protect a defendant's right to a fair trial. See, *e.g.*, *In re Globe Newspaper Co.*, 729 F.2d 47 (1st Cir. 1984); *United States* v. *Chagra*, 701 F.2d 354 (5th Cir. 1983); *Sacramento Bee* v. *United States District Court*, 656 F.2d 477 (9th Cir. 1981), cert. denied, 456 U.S. 983 (1982).

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